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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply 19 3947
Refer to:

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DEW-0116

Thomas L. Kemper, M.D.
Boston City Hospital, Neurological Unit
Medical Building, Room 913
818 Harrison Avenue
Boston, Massachusetts 02118

Dear Dr. Kemper:

This is in response to your letter of January 15, 1979, regarding the decision of the National Institute of Child Health and Human Development (the Institute), Department of Health, Education, and Welfare (HEW), not to fund your proposal for study of the brain of an individual diagnosed as having dyslexia.

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You state that an Institute scientific advisor requested the proposal, which is in a priority area, on April 20, 1977, and assisted with its preparation; you submitted it to the Institute on October 27, 1977, and provided additional information on November 13, 1977. On January 10, 1978, HEW issued a synopsis, NICDH 77-50, which sought organizations capable of studying specific regions of the dyslexic brain. If none were identified, the announcement stated, the Institute planned to negotiate a sole source contract with Boston City Hospital, Boston, Massachusetts, to be performed under your direction.

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On September 27, 1978, however, the contracting officer informed you that your proposal had not been selected for funding; he subsequently stated that this was because the Institute was concerned that the data gained might be relevant to only one patient, rather than to dyslexia in general. You have questioned this statement, particularly in light of the fact that scientific reviewers highly recommended that your proposal be supported as the beginning of a program for comparative evaluation of brains associated with learning and behavioral disorders. You indicate that you consider the decision both unfair and arbitrary.



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letter

[Decision Not To Fund Study of a Dyslexic Brain]

Under our Bid Protest Procedures, our Office reviews the award and proposed award of contracts by Federal agencies to insure that they comply with procurement statutes and regulations. See 4 C.F.R. Part 20 (1978). Although we usually request a documented report from the procuring agency and give the protester an opportunity to comment on that report, we do not do so when it is clear from the initial submission that there is no legal basis for sustaining the protest. Yours, we believe, is a case of this type. For the following reasons, we cannot conclude that HEW is legally obligated to award you a research contract.

Your proposal cannot be considered to have been solicited, because it was not submitted in response to a formal request for proposals. In practical terms, however, it was not unsolicited, as its preparation apparently was encouraged by HEW's scientific staff. (HEW procurement regulations define an unsolicited proposal as one submitted by an organization or individual "solely on its own initiative and without prior formal or informal solicitation.") Nevertheless, HEW handled your submission as such, and we will review the agency's actions in the context of the HEW regulations which apply to unsolicited proposals. 41 C.F.R. § 3-4.52 (1977).

Under these regulations, a favorable technical evaluation of an unsolicited proposal is not a sufficient basis for sole source negotiation. A determination also must be made that its substance is not available to HEW from another source, and a written justification for noncompetitive procurement must be made by the program office sponsoring the unsolicited proposal. Projects involving between \$25,000 and \$100,000 (you sought \$32,257) must be submitted through the contracting officer for approval by the chief of the procurement office, and this approval must be obtained before negotiations are begun by HEW. See also 41 C.F.R. §§ 3-3.802-50(b)(2) and (i)(3) (1977). Thus, the contracting officer correctly advised you that the final decision concerning commitment of funds rests with Institute management.

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We have held that in considering unsolicited proposals, procuring agencies have wide discretion in determining whether such proposals meet their actual needs. Baytron Systems Corporation, B-192329, July 24, 1978, 78-2 CPD 67. In one recent case decided by our Office, an agency which had encouraged a research corporation to submit an unsolicited proposal later decided to procure the same services competitively. The offeror argued that the Government should be equitably estopped from awarding a contract under the formal solicitation. We rejected this argument, pointing out that there was no evidence that the contracting officer had informed the corporation that it would definitely be awarded a sole source contract, and there had been no claim of reliance in the form of expenses incurred or work performed. Andrulis Research Corp., B-190571, April 26, 1978, 78-1 CPD 321.

Similarly, there is no evidence in your case that the contracting officer, the only official authorized to request or accept proposals or to award contracts, definitely advised you that a contract would be awarded to you. Nor have you shown that you incurred expenses or were otherwise materially harmed by relying on representations by HEW's scientific staff. We therefore cannot conclude that HEW is estopped from declining to fund your unsolicited proposal.

In another case, an offeror sought \$100,000 in damages for costs incurred during the seven months it pursued a project which had received a favorable technical evaluation. The offeror assumed that the unsolicited proposal, which was ultimately returned, would be accepted. We found no legal basis for allowing the claim, since the record indicated that the procuring agency had considered the proposal fairly and honestly. The Government had not received any benefit, and the protester had not performed a service on its behalf, we stated, so payment could not be based on either the reasonable value of work and labor (quantum meruit) or the reasonable value of goods sold and delivered (quantum valebat).

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Design Engineering Company, B-182976, January 30,
1976, 76-1 CPD 65. For the same reasons, we doubt
that you have a compensable claim.

In reviewing this matter, we do question whether
HEW's allowing more than a year to elapse between
informally requesting your proposal and notifying
you that it would not be funded is consistent with
the policy of encouraging unsolicited proposals which
is expressed in the agency's regulations. By letter
of today, we are advising the Secretary of our views.

Copies of our Bid Protest Procedures ^{HEU} and of
the decisions referred to above are enclosed for
your information.

Sincerely yours,

MILTON SOCOLAR

Milton J. Socolar
General Counsel